No. 467

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ARMCO STEEL CORPORATION, M. A. HANNA COMPANY, IRON ORE COMPANY OF CANADA, NATIONAL STEEL CORPORATION (WEIRTON STEEL COMPANY DIVISION), REPUBLIC STEEL CORPORATION, WHEELING STEEL CORPORATION, AND THE YOUNGSTOWN SHEET AND TUBE COMPANY, *Appellants,*

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Maryland

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BRIEF ON BEHALF OF ARMCO STEEL CORPORATION, ET AL. IN OPPOSITION TO MOTIONS TO AFFIRM

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November 5, 1957

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At pages 10 to 21 of the Jurisdictional Statement filed in behalf of Armco Steel Corporation, et al., these Appellants have demonstrated that the four questions presented are so substantial as to require plenary consideration by the Court, with briefs on the merits and oral argument, for their resolution. Accordingly this Brief will not reiterate the argument there made and will be confined to certain points upon which additional comment is warranted.

OVERSIMPLIFICATION OF THE CASE BY MOVANTS

The record before the I.C.C. revealed that iron ore in recent years has been imported in ever increasing quantities from several foreign origins. These include Venezuela, Chile, Liberia, Brazil, Sweden, Cuba and Labrador. In its two decisions the Interstate Commerce Commission gave consideration to this and the facts relating thereto. *Iron Ore From Eastern Ports to C.F.A. Points,* 291 I.C.C. 527, 529; 299 I.C.C. 195, 197, 198, 200, 202-203.

The movants indicate their belief that the Interstate Commerce Commission should have limited its considerations, for all practical purposes, solely to iron ore from Labrador. (B. & O.—W. Md. motion, pp. 3-5, 9-10, 19, 21-22, 28; Canton motion, pp. 4-7; Md. Port Auth.-Balt. Assn. Comm. motion, pp. 5, 8, 9)

It is submitted that the theory of these movants is patently incomplete. That they conceive this to be self-serving is no basis for denying the right and the obligation of the I.C.C. to reach its findings and conclusions based upon the whole record. See *Administrative Procedure Act,* 5 U.S.C. 1009(e).

ERRONEOUS THEORY OF MOVANTS AS TO ADEQUACY OF FINDINGS BY THE I.C.C.

The actual rates subject to the jurisdiction and control of the Interstate Commerce Commission [for purposes of this appeal]* are those relating to the

* The appeal of Armco Steel Corporation, et al., is specifically directed against that segment of the decision, judgment, order and decree of the Court below, pertaining to the issue of iron ore railroad rate parity to the Wheeling-Steubenville-Youngstown area from Philadelphia and Baltimore.

transportation by railroad of imported iron ore from the eastern seaboard ports of Baltimore and Philadelphia to Youngstown, Ohio and the other sixteen destinations located in the Wheeling-Steubenville-Youngstown area. Those were the railroad freight rates which were the subject of the I.C.C. suspension and investigation order.

This Court has long recognized the breadth of discretion vested in the Interstate Commerce Commission in carrying out its duties under the Interstate Commerce Act when passing on the lawfulness of rates subject to its jurisdiction. *Board of Trade* v. *United States,* 314 U.S. 534, 546 (1952); *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592, 593 (1949).

It is not our position that the I.C.C. may not give consideration to matters outside its specific statutory jurisdiction. However, we submit that under the theory of the Court below and movants here factors *outside the jurisdiction and control of the I.C.C.* would be the dominant factors. We refer to the wholly disproportionate emphasis they have placed upon "relative costs of ocean shipping." (B. & O.-W. Md. motion, pp. 11, 19, 20; Canton motion, p. 8; Md. Port Auth.-Balt. Assn. Comm. motion, p. 8) See *Baltimore and Ohio Railroad Company* v. *United States,* 151 F. Supp. 258, 278. The Interstate Commerce Commission has no jurisdiction or control over costs of ocean shipping, whatever they may be, to the eastern seaboard of the United States from Venezuela, Chile, Liberia, Brazil, Sweden, Cuba or Labrador.

As revealed in the report of the I.C.C. attacked in the Court below, relative distances from these various foreign sources of iron ore, and factors bearing upon

the use of voyage charter vessels, time charter vessels, or private vessels were given consideration by the I.C.C. and reflected in its preliminary and ultimate findings. *Iron Ore from Eastern Ports to C.F.A. Points,* 299 I.C.C. 195, 198, 202.

It is submitted that the I.C.C. entirely met its responsibilities in evaluating the evidence bearing on these factors in conjunction with the primary evidence in the whole record bearing directly upon matters clearly within I.C.C. jurisdiction and control. In any event, the extent to which a reviewing Court may require the I.C.C. to refine and elaborate its findings on matters *outside the Commission's jurisdiction and control* presents a most substantial question requiring plenary consideration by this Court with briefs on the merits and oral argument.

SERIOUS INCONSISTENCY OF MOVANTS AND OF THE COURT BELOW ON THE FACTOR OF OVERLAND DISTANCE AND RELATIVE OCEAN SHIPPING COSTS

Great emphasis is laid by these movants, and by the Court below, on the comparative overland distance by rail from Baltimore and Philadelphia to the seventeen ore-consuming points in the Wheeling-Steubenville-Youngstown area. (B. & O.-W. Md. motion, pp. 13-16; Canton motion, pp. 6, 9-10; Md. Port Auth.-Balt. Assn. Comm. motion, p. 7) See *Baltimore & Ohio Railroad Company* v. *United States, supra,* p. 274.

The Court below at page 277 completely disregards the differences in overland distances from the same ports to the Pittsburgh District in upholding the lawfulness of iron ore rate parity from Baltimore, and Philadelphia to ore consumers and steel producers

there located who are in vigorous competition with these Appellants located in the Wheeling-Steubenville-Youngstown area. "Relative costs of ocean shipping" apparently give neither the Court below nor these movants the slightest concern with respect to Pittsburgh, but they conceive such costs to be of paramount and decisive importance with respect to Youngstown, Ohio and the other sixteen points just to the west of Pittsburgh.

Again we submit that, at the very least, such a position presents a substantial question warranting plenary consideration by this Court with briefs on the merits and oral argument.

ERRONEOUS LEGAL THEORIES OF MOVANTS

The iron ore rates from Philadelphia to the Wheeling-Steubenville-Youngstown area, published to become effective February 9, 1953, have been upheld unanimously both by I.C.C. Division 2 in the initial decision below and by all ten participating Commissioners in the final decision below. The rates have been in effect since February 19, 1954. Under Section 15(7) of the Interstate Commerce Act the publishing railroad, the Pennsylvania, had ". . . the burden of proof to show that the proposed changed rate . . . is just and reasonable." The Commission properly found that statutory burden has been met as to the rates from Philadelphia published to become effective February 9, 1953.

The theory advanced by the B. & O.-Western Md. interests with respect to Section 1(5) of the Interstate Commerce Act [49 U.S.C. 1(5)], treated in their footnote at page 26 is, we submit, not supported by the cases there cited. Those relate to competitive rates

between (1) I.C.C. regulated *rail carriers* on the one hand and (2) I.C.C. regulated *barge and/or truck carriers* on the other, and set forth principles bearing on *different* modes of transportation not involved here.

The I.C.C. specifically found that the Baltimore carriers offered little, if any, evidence to justify the 20-cent reduction under the Philadelphia rate to Youngstown, etc. filed to become effective February 19, 1954. *Iron Ore From Eastern Ports to C.F.A. Points,* 299 I.C.C. 195, 209. By no stretch of the imagination did the Baltimore lines submit any substantial evidence on this point. See *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 229 (1938).

With respect to the discussion by the railroad movants of Section 3(1) of the Interstate Commerce Act [49 U.S.C. 3(1)] they neglect to mention the following specific language of that statute:

> "Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic *of any other carrier of whatever description.*" (italics added)*

Thus, the railroad movants do not themselves as carriers have any standing to complain under Section 3(1) of the Act.

The motion of the Canton Railroad Company at bottom appears to be a diatribe of frustration directed by a disappointed litigant at the Interstate Commerce Commission. (See pages 2, 3, 4, 7, 8) The glittering generalities expressed are not supported by legal au-

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* See *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.,* 248 I.C.C. 109, 119 (1941).

thorities (including the single instance at page 11 where a decision cited by Appellants is mentioned) nor by specific references to the record or the I.C.C. decisions it has attacked.

At pages 3, 11, 12 this movant, by implication, would leave the impression that the Interstate Commerce Commission considered only domestic iron ore rates in reaching its ultimate findings. Consideration of the domestic iron ore rate structure was entirely proper. The Commission, revealing the completeness of its analysis, also carefully considered the import rates on imported iron ore from various ports to other inland consuming points. *Iron Ore From Eastern Ports to C.F.A. Points*, 291 I.C.C. 527, 537-538. At page 537 it found:

> "... The $2.71 rate [on imported iron ore] from Baltimore to Buffalo applies over the direct route of the Baltimore & Ohio, 592 miles, *which is 190 miles longer* than the haul of 402 miles from and to these points over the direct route of the Pennsylvania. The Western Maryland also participates in the $2.71 rate from Baltimore to Buffalo over a route through Youngstown, a distance of 567 miles, or *165 miles longer* than the haul over the direct route of the Pennsylvania." (italics added)

When the Baltimore interests are benefited the factor of comparative overland distance appears to lose its sacrosanct character so far as they are concerned.

All the foregoing is mentioned to demonstrate that the over-simplification indulged in by movants destroys the validity of their contention. Contrary to their position, it is clear that substantial questions are

presented herein to this Court of such a nature as to require its plenary consideration after briefs and oral argument.

FAILURE OF MOVANTS TO DISCUSS TWO OF THE QUESTIONS RAISED BY THESE APPELLANTS

Questions numbered 3 and 4 raised by these Appellants at pages 3 and 4 of their Jurisdictional Statement present two aspects of what is the most fundamental issue here before this Court. Yet movants never really face up to this issue in their motions to affirm. This basic issue is whether the reviewing Court by its order of remand respecting the iron ore rates from Baltimore and Philadelphia to the Wheeling-Steubenville-Youngstown area, considering the whole record, unlawfully substituted its judgment for that of the Interstate Commerce Commission in a sphere of railroad rate regulation exclusively reserved by the Congress to the I.C.C.

Appellants submit that this is precisely what occurred. Thus there is directly presented the question of when the reviewing Court, by the device of asserting allegedly inadequate findings, can in practical effect substitute its judgment for that of the Interstate Commerce Commission on the issue of the reasonableness and lawfulness of railroad freight rates thereby causing uncertainty and continuing litigation in lieu of a decision determining the issues as to these rates by the agency so empowered by the Congress.

If decisions of this Court, such as *Board of Trade v. United States*, and *Ayrshire Collieries Corp. v. United States, supra*, are not to be robbed of real meaning the questions raised by these Appellants should be answered. They should be answered in this pro-

ceeding by this Court after plenary consideration within the meaning of Rule 15(2)(f). The answers to these questions are of paramount importance to the proper administration of the Interstate Commerce Act and to those directly affected thereby such as these Appellants.

CONCLUSION

For the reasons stated both herein and in the Jurisdictional Statement previously filed by these Appellants, it is submitted that the questions presented by this appeal are so substantial as to require plenary consideration by the Supreme Court of the United States, with briefs on the merits and oral argument, for their resolution. We therefore pray that the motions to affirm be denied, that jurisdiction be noted and that the order, judgment and decree of the court below be reversed in respect to the issues and questions raised by this appeal.

Dated at Washington, D. C. this 5th day of November, 1957.

Respectfully submitted,

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